

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

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|---------------------|---|----------------------|
| HEIDI SPROW |) | |
| Charging Party, |) | Cause No. 9901008758 |
| |) | |
| VS. |) | |
| |) | ORDER REMANDING |
| |) | FINAL AGENCY |
| CENTECH CORPORATION |) | DECISION FOR LIMITED |
| Respondents. |) | REVIEW |

The above-captioned matter came before the Montana Human Rights Commission (Commission) on November 22, 2002. The Commission considered Respondent's appeal to the Montana Human Rights Bureau's Final Agency Decision issued March 2, 2000. Oral argument was requested. Geoffrey Angel appeared on behalf of Charging Party and James Kommers appeared on behalf of Respondent.

BACKGROUND

Charging Party Heidi Sprow (Sprow) began working for the Respondent, Centech (Centech) on August 17, 1998 as a full-time employee earning \$7.50 an hour. In October 1998, Sprow requested that the corporation make her a part-time employee. This resulted in a reduction in wages. After going to part-time status, she learned that another male part-time employee was being paid more than she was. On December 12, 1998 she filed a complaint with Montana's Human Rights Bureau alleging discrimination based on sex and disparate treatment in wages.

A hearing was held on December 6, 1999 and the Final Agency Decision was issued March 2, 2000. In this decision, the hearing officer found that there was no

discrimination based on gender while Sprow worked for Centech part-time. But, the officer determined that Centech had illegally discriminated during Sprow's full-time employment. The Final Agency Decision awarded damages and ordered affirmative relief. Respondent Centech filed notice of appeal to the Human Rights Commission.

On May 15, 2000, pursuant to the Commission's briefing schedule, Centech attempted to submit its brief in support of objections. However, due to technical problems with the facsimile machine at the Human Rights Bureau the entire brief was not received. On May 19, 2000, the Human Rights Commission issued an "Order Regarding Timeliness of Brief" and declined to hear the case. Centech appealed the Commission's Order to the Eighteenth Judicial District and that court affirmed the Commission's order. Centech then appealed to the Montana Supreme Court where the matter was reversed and remanded:

. . . pursuant to the Department's own regulations, it has the authority to suspend, waive or modify its rules to prevent manifest prejudice to a party, assure a fair hearing, or afford substantial justice. The facts of this case justify such action. It unreasonably elevates form over substance to dismiss Centech's administrative appeal. . .

CenTech Corp. v. Sprow (2001), 2001 MT 298, 307 Mont. 481, 38 P.3d 812

On February 7, 2002, the Eighteenth Judicial District Court ordered the Human Rights Commission to receive Respondent's brief and proceed with the appeal. On November 22, 2002 the Commission heard oral argument on the matter. The record and a transcript of the lower-level proceedings were transmitted to the Commission for review.

DISCUSSION

Montana law prohibits discrimination in employment because of sex. § 49-2-303(1)(a), MCA. In the Final Agency Decision the hearing officer lays out the shifting

burden analysis often used in employment cases. *See McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817. The hearing officer states that Sprow must prove that the corporation took adverse employment action against her because she was a woman. *Final Agency Decision*, pg. 3. Once she does this, then Centech must show that it had a legitimate non-discriminatory reason for its action. *Id.* If the corporation proffers a legitimate reason then the burden shifts back to Sprow to prove that the reason was in fact pre-textual. *Id.*

When employing this analysis, the hearing officer found that Sprow had established a prima facie case for discrimination in employment during her part-time employment. She was being paid less than a comparable male employee at Centech. The hearing officer then found that Centech established a non-pretextual legitimate non-discriminatory reason for its actions. Namely, Centech paid this particular male employee more than Sprow because it hoped to induce him into becoming a full-time employee.

From there, the officer went further and found that Centech's legitimate non-discriminatory reason for paying its male part-time employee more did not explain why the corporation rewarded full-time males more than full-time females. In a footnote of the Final Agency Decision it states, "Sprow's contentions included some references to the full-time wage rates that were pivotal to this decision. Her case focused more on the part-time wages she earned. By amending the pleadings and issues to conform to the evidence, the hearing examiner included the full-time wages within the jurisdiction of the department of this case." *Final Agency Decision*, fn. 7, pg. 4. With this, the officer concluded that the Centech had illegally discriminated since it had failed to establish a

legitimate non-discriminatory reason for disparate pay while Charging Party was employed full-time.

Certainly, as a general rule, such amendments to the pleadings to conform to the evidence presented during a proceeding are to be granted freely. See *Union Exchange, Inc. v. Parker* (1960), 138 Mont. 348, 357 P.2d 339. Rule 15(b) provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ." *Rule 15(b), M.R.Civ.P.* However, in this case, the Commission concludes that such an amendment constitutes an error of law.

A review of the record reflects the case presented by Sprow focused on the disparate pay during her part-time status. (This is noted in the decision.) And, whereas there may be the suggestion that the issue of disparate pay had been generally raised, the mere suggestion does not rise to the level of being tried "by express or implied consent of the parties." *Rule 15(b), M.R.Civ.P.* The general rule of liberal construction and amendment of pleadings does not grant a party the right to freely advance new theories during the course of a trial, much less afterwards. See *Ryan v. City of Bozeman* (1996), 279 Mont. 507, 928 P.2d 228. This is especially true in a case, such as this, where the fact-finder is employing a shifting burden analysis.

On appeal, Centech does not contest or deny that the evidence presented at the lower-level hearing would establish that it paid full-time women employees less than male counterparts. Rather, it contends that had it been given the opportunity to defend it would have proffered a legitimate non-discriminatory reason for the disparity.

Respondent's Reply Brief to Charging Party's Brief Opposing Respondent's Appeal pg. 2.

Since it is the intent and obligation of the Human Rights Commission to prevent manifest prejudice to a party, assure a fair hearing, and afford substantial justice the Commission remands this matter. Simply reversing this matter based on procedural error, rather than on the merits, would interfere with the both parties right to a fundamentally fair hearing.

Therefore, the Commission HEREBY remands this matter to the Hearing Bureau for the limited purpose of providing Respondent Centech the opportunity to present legitimate non-discriminatory reason for paying its full-time women employees less than its full-time male employees. Once a decision is issued, the parties will again be afforded the opportunity to appeal to the Commission pursuant to rule.

Dated this _____ day of January 2003

Mr. Gary Hindoien, Chair
Montana Human Rights Commission

CERTIFICATE OF SERVICE

The undersign employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on January ____, 2003.

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